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No. 04-740

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SSA GULF, INC.,

Petitioner,

v.

ROOSEVELT MAGEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner's Rule 29.6 Statement is set out at page iii of the Petition, and there are no amendments to that statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents the question whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331.

The Brief in Opposition ("BIO") argues that this Court should deny review in this case because it recently denied review of a related cert. petition, No. 04-327, *SSA Gulf, Inc. v. United States Dist. Court for the Eastern Dist. of Louisiana*, 125 S. Ct. 508 (2004) ("*Hernandez*"). But the BIO simply ignores the showing in the Petition that this Court has often granted certiorari after initially denying the writ in a previous case presenting the same legal question. *See* Pet. 6-7 n.1. This Court should follow that course here. The Fifth Circuit has demonstrated that its decision in *Hernandez* was not aberrational. The Fifth Circuit will continue to allow state-court plaintiffs to evade the exclusivity provision of the LHWCA and to frustrate the statutory scheme crafted by Congress.

Indeed, the Fifth Circuit's decision stands as an open invitation to plaintiffs to file suit against stevedoring defendants in one of the leading "judicial hellholes" in the country, in the words of the American Tort Reform Association. *See* Petition at 22 n.3. Respondent's suggestion that thus far there has been no "flood" of state-court cases (BIO 15) is disingenuous. The flood is already beginning, and nothing in the Fifth Circuit's decision presents a limiting principle that would stop it.

1. The BIO fails to come to grips with the central issue in this case: the need for *federal courts*, rather than *state courts and juries*, to decide questions of scope and coverage under the LHWCA. Indeed, the BIO takes the position that such issues may be resolved in the state courts. The BIO maintains that "whether § 905(a) bars respondent from any state tort recovery

from petitioner" is a "fact-intensive" question that "can be resolved only after fact development in the trial court" – i.e., the *state* court. BIO 12.

Such a suggestion is completely inconsistent with the statutory scheme designed by Congress. Tellingly, respondent offers no answer at all to the extensive showing in the Petition (pp. 16-21) that the text, structure, and legislative history of the LHWCA uniformly demonstrate that Congress intended that questions under the Act, including coverage decisions, would be decided by *federal* rather than *state* courts. This Court's review is therefore urgently required.

2. The BIO acknowledges that "[t]he decision below would conflict with the cases cited by petitioner" if "the court had held that LHWCA is not the exclusive remedy for certain workplace injury claims brought by longshore employees against their employers." BIO 12.

This concession demonstrates the need for certiorari. Although the district court, following the decision in *Hernandez v. Todd Shipyards*, 2004 WL 1543184 (E.D. La. 2004), did not reach petitioner's Rule 12(b)(6) motion to dismiss based on the exclusive remedy provisions of the LHWCA, respondent does not deny that the practical effect of the district court's ruling will be to eliminate the exclusively federal forum designed by Congress. Under the decisions of the courts below, state-court judges and state-court juries will decide the issue of the LHWCA's preemptive scope. For this reason alone, this Court's review is urgently needed in order to protect the statutory scheme crafted by Congress from impermissible interference by the state courts.

Further, it is inconsistent for respondent to argue now that the exclusivity issue was somehow not before the district court. Respondent himself squarely raised the issue. For example, in his petition for damages, respondent alleged that his "theory of recovery for negligence" against his stevedoring employers was

that "the employer defendants negligently failed in the performance of their delegated responsibilities and/or actual undertakings to provide Plaintiff with safe premises and cargo." ¶ 79. Such a state-law negligence claim cannot be reconciled with the exclusivity provision of the LHWCA.

In fact, respondent's persistent position in this litigation has always been that the LHWCA is not an exclusive remedy for injured longshore workers. In his motion to remand in the district court, respondent argued that "[t]his case should be remanded to state court because the language of the 1972 amendments to the [LHWCA] cannot be fairly understood as preempting state remedies." Motion to Remand at 6. "SSA Gulf cannot show that the LHWCA is the exclusive remedy." *Id.* "LHWCA contains no express declaration of Congressional intent to prohibit states from providing compensation to injured workers in lieu of, or in addition to the benefits provided under the LHWCA." *Id.* "[A]n injured worker has the option of pursuing a claim for remedies under either state law or federal law. In this case, plaintiff chose to pursue a state remedy for his injuries, which include actions in tort." *Id.* at 7. Respondent urged the district court to follow the decision of the Louisiana Supreme Court in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977), which expressly *rejected* the settled propositions that "the 1972 amendments to the [LHWCA] have the effect of preempting the power of this state to provide a compensation remedy to maritime workers injured on our soil"; that "the need for uniformity in the field of admiralty law demands that federal law operate exclusively as to covered workers"; and that "the history and wording of the [LHWCA] evidence a Congressional intent that federal law in this area be preeminent." *Id.* at 1215. The Louisiana court opined: "We do not agree with any of these contentions." *Id.*

Having urged this view on the district court below, and having consistently contended throughout the proceeding that

this case should be remanded to the state courts because the LHWCA is not an exclusive remedy, respondent now seeks to switch gears and argue that the exclusivity issue is not presented by this case. Respondent cannot have it both ways.

3. The BIO contends that the Fifth Circuit's decision does not conflict with governing precedent. The BIO is wrong. The decision below conflicts with a holding of the Fourth Circuit, as well as with governing precedent from this Court regarding both the LHWCA and the "complete preemption" doctrine.

First, respondent fails to distinguish *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998). BIO 10 n.3. Indeed, respondent admits that *Shives* held that an employee covered by the LHWCA was required to pursue compensation under the Act, to the exclusion of other claims. BIO 10 n.3. Further, the Fourth Circuit squarely held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." 151 F.3d at 167. Under respondent's view, the same inquiry would be conducted by a state court, not a federal court. There can be no doubt that, if respondent's state-court complaint had been filed in the Fourth Circuit, it would have been removed to federal court and dismissed. Under the decisions below, state-court complaints filed in the Fifth Circuit, if removed to federal court, will be remanded to state court instead. There is a thus a stark circuit conflict in this case.

Next, the Fifth Circuit's decision is inconsistent with this Court's decisions recognizing the exclusive nature of the LHWCA remedy. The BIO cites a handful of cases in an effort to suggest that the exclusivity provision of the LHWCA (§ 905(a)) would permit respondent to pursue a state-court suit for tort damages. BIO 12. Yet this Court this Court has long taken precisely the opposite view, squarely holding that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944). With respect to an

employer, "the LHWCA expressly pre-empts all other claims." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 (1979); *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111-13 (1974); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952). At least eight circuits have similarly held that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees.[1]

The cases cited in the BIO (at 12) are inapposite because they do not involve state-court tort suits by a stevedore against his employer. For example, *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), concerned the administrative remedy of a state workers compensation award to a stevedore – not a state-law tort claim against the employer. *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523 (1983), involved a claim under § 5(b) of the Act against a vessel owner rather than (as in this case) a claim against an independent stevedoring company under state law. This Court stressed that its decision did not mean that a stevedore like respondent could pursue a claim directly against a stevedore employer like petitioner: "Of course, § 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its

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[1] *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 540 U.S. 1177 (2004); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938-39 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

'stevedore' capacity." *Id.* at 531 n.6.

Likewise, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (cited at Pet. 12), concerned a member of a vessel's crew, not a stevedoring employee. In fact, the Court indicated that the Act's exclusivity provision would "dictate sole recourse to the LHWCA" if the plaintiff were "found not to be 'a master or member of a crew of any vessel.'" *Id.* at 491 n.3. This case presents the situation that *Gizoni* indicated would be governed by the LHWCA's exclusivity provision.

Respondent also cites *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) (cited at Pet. 12), but that case was a coverage dispute – whether a welder was engaged in "maritime employment" and thus within the protections of the LHWCA. That case did not question the proposition that the LHWCA's remedy is exclusive for a stevedore employee like respondent who is indisputably within the scope of the LHWCA. Indeed, the *Herb's Welding* Court noted "Congress' undoubted desire to treat equally all workers engaged in loading or unloading a ship," *id.* at 426 – a uniformity that would disappear under respondent's construction of the LHWCA, as different state courts would be free to reach conflicting coverage decisions and different states could engraft varying tort remedies upon the administrative scheme created by the Act.

In addition, the Fifth Circuit's decision conflicts with this Court's recent decisions involving the complete preemption doctrine and with lower court decisions faithfully following this Court. Respondent offers no answer to the extensive discussion in the Petition regarding *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), and *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Respondent's sole strategy is to mischaracterize our position as supposedly claiming that "any federal statute with an exclusive remedy provision that might form the basis for a federal preemption defense in state court would become as source of complete preemption." BIO 14. We propose no such

sweeping, hard-and-fast rule. Rather, we have argued simply that both *Beneficial Nat'l Bank* and *Davila* instruct that a significant factor in the complete preemption doctrine is the federal interest in preserving the uniformity of a comprehensive statutory scheme. 539 U.S. at 10-11; 124 S. Ct. at 2495. The same federal interest lies at the heart of the LHWCA. In particular, the LHWCA evinces a plain intent to displace state courts and state judicial remedies, and this federal interest would be further frustrated by respondent's proposal that SAA Gulf's "defense . . . can be raised in state court." BIO 12.

4. Respondent spills much ink regarding 28 U.S.C. § 1447(d). Yet that statutory provision was not mentioned in either the Fifth Circuit's Order, Pet. App. 1a, or in respondent's opposition to the petition for writ of mandamus in the court of appeals. In any event, § 1447(d) would not bar review here, and any uncertainty regarding its meaning only provides a further reason to grant certiorari.

Respondent contends that "every court of appeals to have addressed the issue has concluded that a remand based on a lack of complete preemption is insulated from review under § 1447(d)." BIO 4. That is untrue. In *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1133 (9th Cir. 1992), for example, the Ninth Circuit reversed a remand order after concluding that the plaintiff's claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.* The Ninth Circuit noted that "the district court's remand order embodied a jurisdictional decision under authority of section 1447(c)" and that the plaintiff therefore argued that "section 1447(d) bar against any type of review applies." *Id.* at 1129. But the court of appeals held that Section 1447(d) did not bar review: "Federal interests and concerns, however, sometimes rise to a level of importance that requires an exception. To invoke it, Congress must have expressed a desire to assert authority over an area to such degree that any claim in that area is deemed federal in character. . . . [Such claims] must be removed to federal courts

and not remanded to state courts." *Id.* at 1130.

Moreover, the BIO ignores the showing in the Petition (pp. 24-26) that the special nature of the LHWCA makes this case different from the other preemption cases cited by respondent. *See* BIO 4-7. In the LHWCA context, the issue is not simply the jurisdictional question of whether state-law tort claims should proceed in federal state or in state court, but whether the tort claims may proceed *at all* in *any* court in light of the statutory provisions mandating dismissal. When the right the defendant is asserting is not merely the right to a federal forum but also the right not to be sued *at all* in *any* forum (and the concomitant right to have the plaintiff remitted to his administrative remedies exclusively), that right cannot be vindicated by telling the defendant that he can raise his argument as a defense in state court. As this Court explained in *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 24 n. 27 (1983), "the proper course for a federal district court to take after removal would be to dismiss the case altogether, without reaching the merits." *See also Clorox, Co. v. United States District Court for the Northern District of California*, 779 F.2d 517, 522 (9th Cir. 1985) (reversing district court remand order where federal law displaced state claims: "Once the district court discovers that the state court had no jurisdiction over a claim, rather than engage in a fruitless remand to a state court that lacks independent subject matter jurisdiction, it should dismiss the claim").

Because the LHWCA's administrative remedies bar tort suits in both state and federal courts, the cases cited in the BIO at pp. 4-7 are inapposite.[2] Indeed, the situation here resembles the

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[2] The cases cited by respondent have been the subject of criticism. *E.g.*, *Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282, 1286 (D. Colo. 2002) ("*Nutter* has subsequently been called into question and rejected by other circuits.") (citing *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997)).

immunity cases that the BIO attempts vainly to distinguish. BIO 8 n.2.

The situation here is also parallel to that in *Shives*, where the Fourth Circuit held that appellate review of a district court's remand order was available under *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976): "If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d)" – the very disposition that respondent urges in this case – "then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals." 151 F.3d at 167. "To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in *Thermtron* for exercise of the writ." *Id.* at 167-68.

By contrast, under respondent's view, federal appellate courts would lack the authority to protect comprehensive statutory schemes from state-court interference. *Shives* is thus irreconcilable with the decision below. Similarly, in *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1193 (8th Cir. 1988), the Eighth Circuit granted a writ of mandamus to correct a district court's remand order that was based on the erroneous conclusion that the plaintiffs' claim was not preempted by ERISA. "The district court ruled that as a matter of federal law ERISA does not preempt a [state-law] claim . . . and then remanded the claim to state court. Had the district court instead dismissed the complaint, this ruling would be directly appealable as a final order. The remand, however, is not directly appealable as a final order to this court. As a result of the remand, then, this court will never have appellate jurisdiction over this order in the

absence of review by mandamus." *Id.* at 1193.[3] The same reasoning applies here.

Respondent seeks to distinguish *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (appellate court had power to review issue which "preceded that of remand"), on the ground that the district court's ruling "is not the final word on the issue of preemption." BIO 8. But the district court's order is conclusive on the rights of the parties in the important sense that petitioner asserts the right to have a federal court, not a state court, pass on the question of the scope and applicability of the LHWCA – and, indeed, the right to have the case dismissed at once and the plaintiff remitted to his administrative remedies. That right cannot be vindicated if the case is remanded to state court. In that important sense, the district court remand order *is* the "final word." This Court's review is urgently required.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

Respectfully submitted.

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[3] Although *In re Life Ins.* did not involve Section 1447(c), *see* 857 F.2d at 1193 n.1, its reasoning is nonetheless instructive.

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